

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
July 20, 2006 Session

LINDA KAY HENSLEY v. JOHNNY CLINE HENSLEY

Appeal from the Chancery Court for Greene County
No. 20020270 Thomas R. Frierson, II, Chancellor

No. E2005-02735-COA-R3-CV - FILED AUGUST 29, 2006

The issues presented in this divorce case are whether the evidence preponderates against the trial court's award to Wife for her contribution to the appreciation and preservation of Husband's separate real property; whether the trial court erred in awarding Wife transitional alimony; and whether the trial court erred in awarding Wife attorney's fees. The Wife raises the additional issue of whether certain property classified by the trial court as Husband's separate property should have been classified as marital. We affirm the judgment of the trial court in all respects.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed;
Case Remanded

SHARON G. LEE, J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR. AND D. MICHAEL SWINEY, JJ., joined.

Gene Paul Gaby, Greeneville, Tennessee, for the Appellant, Johnny Cline Hensley.

K. Kidwell King, Jr., Greeneville, Tennessee, for the Appellee, Linda Kay Hensley.

OPINION

I. Background

Johnny Cline Hensley ("Husband") and Linda Kay Hensley ("Wife") were remarried to each other on October 10, 1987. This was the third marriage for both parties and their second marriage to each other. Husband and Wife have no children together. During their marriage, the parties resided on Husband's farm. When Wife moved to the farm in 1987, the parties lived in the "brown house," which was the only house located on the property at the time. In the late 1990's, Husband and Wife agreed to build a smaller retirement home (the "new house") on a portion of the property. The parties used the brown house and surrounding land to secure a loan for the construction of the new house.

Shortly after the parties moved into the new house, Wife became concerned with Husband's absences from the home. Wife confronted Husband on June 13, 2002, which led to an altercation and, ultimately, the parties' separation. Wife filed for divorce in August of 2002, after nearly 15 years of marriage.

Following the trial of this case, the trial court entered an order granting Wife a divorce on the ground of inappropriate marital conduct. The trial court found that “during this marriage, Mr. and Ms. Hensley separately titled or maintained the separate identity of most assets. The Hensley's [sic] did not comingle [sic] funds and they maintained no joint bank accounts.” The trial court concluded that the entire farm, including the brown house, the new house, and all 38.95 acres, was Husband's separate property. The trial court valued the entire farm at \$366,000 after hearing testimony from both parties' experts.

The trial court found that Wife made substantial contributions to the preservation and appreciation of the farm during the course of the marriage, and therefore the trial court held that the increase in value of the farm during the marriage was marital property, pursuant to T.C.A. § 36-4-121(b)(1)(B). The trial court found that the value of the farm at the time of marriage was “approximately \$200,000.” Based upon Wife's contributions to the preservation and appreciation of the property awarded to Husband, the trial court awarded Wife \$20,000 for the increase in value of the brown house and \$25,000 for the increase in value of the new house. The trial court also awarded Wife a house she had owned before the marriage and maintained during the marriage, valued at \$48,000, as her separate property.

The trial court awarded Wife transitional alimony in the amount of \$400 per month for a period of five years. The trial court also awarded Wife attorney's fees.

II. Issues Presented

Husband appeals, raising the following issues for our review:

1. Whether the trial court erred in its awards to Wife for her substantial contribution to the preservation and appreciation of the farm;
2. Whether the trial court erred in awarding Wife transitional alimony; and
3. Whether the trial court erred in taxing Wife's attorney's fees to Husband.

Additionally, Wife raises the following issues:

4. Whether the trial court erred in holding that the new house, and the ten acres purchased by Husband during the marriage, were Husband's separate property.

5. Whether the trial court should have awarded her a greater share of the appreciation in value of the farm.

III. Standard of Review

We review this non-jury case *de novo* upon the record of the proceedings below. When examining findings of fact, we adhere to the principle that “[t]he findings of the trial court which are dependent upon determining the credibility of witnesses are entitled to great weight on appeal.” *Bowman v. Bowman*, 836 S.W.2d 563, 566 (Tenn. Ct. App. 1991). *See also Hartman v. Hartman*, No. E2005-00010-COA-R3-CV, 2006 WL 2135454, at *4 (Tenn. Ct. App. E.S., July 31, 2006). Thus, the record carries a presumption of correctness as to the trial court's factual findings, which we must uphold unless the evidence preponderates against them. Tenn. R. App. P. 13(d); *Wright v. City of Knoxville*, 898 S.W.2d 177, 181 (Tenn. 1995); *Union Carbide Corp. v. Huddleston*, 854 S.W.2d 87, 91 (Tenn. 1993). But the trial court's conclusions of law are not granted such deference. *Campbell v. Florida Steel Corp.*, 919 S.W.2d 26, 35 (Tenn. 1996); *Presley v. Bennett*, 860 S.W.2d 857, 859 (Tenn. 1993).

IV. Analysis

A. DIVISION OF PROPERTY

A trial court dividing property in a divorce must begin by classifying the parties' property as “marital” or “separate.” *McClellan v. McClellan*, 873 S.W.2d 350, 351 (Tenn. Ct. App. 1993). Property owned by a spouse before marriage is deemed “separate property.” T.C.A. § 36-4-121(b)(2)(A). “Marital property,” as defined in T.C.A. § 36-4-121(b)(1)(B), includes “any increase in value during the marriage of, property determined to be separate property in accordance with subdivision (b)(2) if each party substantially contributed to its preservation and appreciation.” To be considered substantial, a spouse's contribution must be “real and significant.” *Brown v. Brown*, 913 S.W.2d 163, 167 (Tenn. Ct. App. 1994). The contributions “need not, however, be monetarily commensurate to the appreciation in the separate property's value, nor must they relate directly to the separate property at issue.” *Id.* (citing *Mahaffey v. Mahaffey*, 775 S.W.2d 618, 623 (Tenn. Ct. App. 1989)).

We initially note that Husband makes two arguments regarding the distribution of property: that Wife did not substantially contribute to any increase in the value of the property; and that there was no competent evidence to support the trial court's determination of the increased property value during the marriage. Both of these arguments involve questions of fact. *See, e.g., Powell v. Powell*, 124 S.W.3d 100, 103 (Tenn. Ct. App. 2003) (noting that valuation of a marital asset is a question of fact and is entitled to great weight on appeal); *Brown*, 913 S.W.2d at 167 (stating that whether a spouse made a substantial contribution is a question of fact).

Husband asserts that the trial court erred in determining that Wife made a substantial contribution to the preservation and appreciation of the farm and its improvements during the

marriage. “Substantial contribution” is defined in T.C.A. § 36-4-121(b)(1)(D) to include “the direct or indirect contribution of a spouse as homemaker, wage earner, parent or family financial manager.” The evidence does not preponderate against the trial court’s conclusion that Wife made both direct and indirect substantial contributions to the farm during the marriage. In this regard, the trial court found as follows:

The evidence supports a determination that during her residence in the brown house, Ms. Hensley used a portion of her income to assist in paying the mortgage, purchasing materials for improvements and defraying certain utility costs. Additionally, Ms. Hensley assisted personally in performing tasks supporting the valuable improvements made to the real property. Ms. Hensley also provided substantial contributions, both direct and indirect, as homemaker and wage earner, which enabled Mr. Hensley to preserve the real property during the marriage, particularly during the period of his limited income.

With regard to the new house, Ms. Hensley similarly provided, both directly and indirectly, substantial contributions as homemaker and wage earner with respect to the construction. Inasmuch, Ms. Hensley offered her personal labor when appropriate.

For a substantial portion of the marriage, beginning around 1994, Wife was the primary wage-earner of the marriage, because Husband, who suffers from depression and severe allergies, became vocationally disabled. Wife testified that in addition to working full-time as a hairstylist, she did all of the cooking, cleaning and other domestic tasks, and also helped to take care of Husband’s son, who lived with them in the brown house for three or four years while he was a teenager. Regarding the brown house, Wife testified that she worked to renovate and update it by buying a dishwasher, a new sink and new fixtures, new steps to the basement, and installing new wallpaper, tile and carpet. Regarding the new house, Wife testified that she took an active role in picking out and working on the design of the house, and that she helped in the physical labor of the house construction. Wife also testified that she made financial contributions to the new house. The trial court obviously credited Wife’s testimony, and did not err in holding that Wife was entitled to a portion of the increase in value of the assets of the farm due to her substantial marital contributions.

We next address Husband’s argument that the trial court erred in its determination of the appreciated value of the farm over the course of the 15-year marriage. In determining the value of a marital asset, a trial court may consider all relevant evidence regarding value. *Wallace v. Wallace*, 733 S.W.2d 102, 107 (Tenn. Ct. App. 1987). The parties carry the burden of presenting competent evidence of value, and parties are bound by the evidence they present. *Id.* “If the evidence of value is conflicting, the trial judge may assign a value that is within the range of values supported by the evidence.” *Powell*, 124 S.W.3d at 105-06.

The trial court, after hearing the evidence presented by both parties as to the value of the farm, placed the value of the entire property at \$366,000. In Husband's Statement of Assets and Liabilities as of 2005, filed with the trial court in this divorce litigation, as well as in his appellate brief, he values the farm at \$365,182. The trial court's determination that the farm is worth \$366,000 is supported by evidence presented by both parties. As already noted, the trial court found that the farm's value at time of the marriage was approximately \$200,000.

The trial court did not make any separate findings of fact regarding the individual values of the brown house or the new house, choosing instead to evaluate the farm as a whole. However, in its memorandum opinion, the trial court did employ language suggesting a connection between the specific assets of the farm (the individual houses) and its award to Wife for her part of the marital property, stating, "[w]ith respect to the 'brown house' Ms. Hensley is entitled to an award of \$20,000.00. Regarding the 'new house,' Ms. Hensley is entitled to an award of \$25,000.00."

Husband takes issue with these awards as follows. Regarding the brown house, Husband argues that "Mrs. Hensley was not entitled to an award of separate property for an increase in value in the brown house because there was no competent evidence presented of any increase in its value during the marriage." Husband is correct in stating that the trial court heard little, if any, competent evidence as to the value of the brown house, as separate from the rest of the farm. The brown house was not appraised, and any discussion as to its value was generally limited to Wife's contributions in updating the house for resale. Wife stated that she "updated the house from a '70s to a '90s house."

Regarding the new house, Husband argues that the trial court erred in awarding Wife \$25,000 for its preservation and appreciation. Husband argues that if his current debt on the home (\$131,974.28) is subtracted from the house's fair market value (\$146,500), the total equity value of the house is less than Wife's award. Husband relies upon his estimate of the actual value of the new house only, rather than the value of the new house and surrounding acreage. Mr. Miller appraised the new house and the five acres at the top of the hill on which it is located at \$169,000. In addition, Mr. Miller testified that the new house added value to the rest of the property:

Q: Mr. Miller, there's been testimony in this record today I'd like to ask you a bit of a hypothetical about. There's testimony in the record that the appraisal -- that the value of this whole farm was \$142,000.00 in the summer of 2000 before any construction was started. That the value of the property now is \$366,000.00. That's \$220,000.00, is that right?

A: That's close, yeah.

Q: \$220,000.00. Do you think -- are you able to express an opinion hypothetically, if the addition of the new house and the new structure

on that property is enough to add \$220,000.00 to the value of that property between those two years?

A: Between?

Q: Between 2000 and 2005?

A: That would be, I think, reasonable to be close. Yeah, I would think.

Husband's arguments regarding the trial court's award as related to the specific assets of the farm miss the central point – that the trial court found that Wife's contributions over the course of the marriage preserved and enhanced the *entire* property. There is abundant evidence supporting this conclusion, some of which we have already outlined above. Wife made contributions to the construction and preservation of the farm as homemaker, laborer, and wage earner. Wife presented evidence that she made direct contributions to the unimproved real property. Wife's contributions enabled the parties to construct the new house and retain the property. Irrespective of the specific values of the brown house and the new house, which the trial court did not individually evaluate, we believe that the total award of \$45,000 for her share of the marital property, based on her contributions to the maintenance and improvement of Husband's separate property – the farm – is well within the range of values submitted in evidence.

Wife argues that the new house and the land purchased in 1992, which added approximately 10 acres to the farm, were marital property, entitling her to one-half interest in each. "Separate property," as defined in T.C.A. § 36-4-121(b)(2), includes property owned by a spouse before marriage and property acquired in exchange for property owned before the marriage. Property purchased during marriage gives rise to a presumption that the property is marital; however, this presumption can be overcome with evidence that parties intended to keep the property separate. *Scott v. Scott*, No. 03A01-9111-CH-404, 1992 WL 91511, at *2 (Tenn. Ct. App. E.S., May 6, 1992). If the separate property can be traced to its product, commingling has not occurred. *Id.* at *1.

There was evidence that throughout this marriage, the third marriage for both parties, the parties intended to keep assets separate. According to Wife's testimony, Husband made it clear that "he didn't want his finances mixed up with anyone's finances -- any women, me or anyone else." Husband had previously owned the property in question and he repurchased it in 1992 using funds he received from selling a business he owned prior to the marriage. Husband obtained a loan for construction of the new house using the brown house and surrounding land, his separate property, as a security interest. We agree with the trial court that the parties intended to keep assets separate. The parties have rebutted the presumption that the 1992 property and the new house were intended to be marital.

Wife argues that she should have received a larger award for the appreciation in value of the brown house and the new house during the marriage. In her brief, she states that her contributions

toward updating the brown house entitle her to more than a “minuscule fraction” of the house's value. Wife asserts that her contributions to the new house include participating in the loan process, designing the house, and engaging in physical labor. Pursuant to our analysis above, we find that the evidence does not preponderate against the trial court’s total award of \$45,000 to Wife, and that it represents an equitable division of the marital property. Consequently, we affirm the trial court’s judgment regarding the division of marital property between the parties.

B. ALIMONY

Husband argues that the trial court erred in awarding Wife transitional alimony in the amount of \$400 per month for a period of five years. A trial court’s determination of whether an alimony award is appropriate depends on the facts and circumstances of each case. *Sullivan v. Sullivan*, 107 S.W.3d 507, 510 (Tenn. Ct. App. 2002). In an alimony award determination, a trial court must consider the relevant factors listed in T.C.A. § 36-5-121. The two most important factors a trial court must consider are the need of the disadvantaged spouse and the obligor spouse's ability to pay. *Bratton v. Bratton*, 136 S.W.3d 595, 604 (Tenn. 2004). Trial courts have broad discretion in determining the type, amount, and duration of spousal support and appellate courts will not interfere with the award absent an abuse of discretion. *Wood v. Wood*, No. M2003-00193-COA-R3-CV, 2004 WL 3008875, at *4 (Tenn. Ct. App. M.S., Dec. 28, 2004); *see also Burlew v. Burlew*, 40 S.W.3d 465, 470 (Tenn. 2001).

A trial court is required to consider the following statutory factors in making an alimony award:

- (1) The relative earning capacity, obligations, needs, and financial resources of each party, including income from pension, profit sharing or retirement plans and all other sources;
- (2) The relative education and training of each party, the ability and opportunity of each party to secure such education and training, and the necessity of a party to secure further education and training to improve such party's earnings capacity to a reasonable level;
- (3) The duration of the marriage;
- (4) The age and mental condition of each party;
- (5) The physical condition of each party, including, but not limited to, physical disability or incapacity due to a chronic debilitating disease;
- (6) The extent to which it would be undesirable for a party to seek employment outside the home, because such party will be custodian of a minor child of the marriage;

- (7) The separate assets of each party, both real and personal, tangible and intangible;
- (8) The provisions made with regard to the marital property, as defined in § 36-4-121;
- (9) The standard of living of the parties established during the marriage;
- (10) The extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by a party to the education, training or increased earning power of the other party;
- (11) The relative fault of the parties, in cases where the court, in its discretion, deems it appropriate to do so; and
- (12) Such other factors, including the tax consequences to each party, as are necessary to consider the equities between the parties.

T. C. A. § 36-5-121(i) (2006).

In its memorandum opinion, the trial court held:

This Court determines that for Ms. Hensley, rehabilitation is not necessary, but as an economically disadvantaged spouse, she needs assistance to adjust to the economic consequences of the divorce. This Court therefore awards to Ms. Hensley transitional alimony for a period of five years following the entry of the Final Judgment of Divorce. The amount of alimony shall be \$400.00 per month, non-modifiable, but terminable upon any remarriage by Ms. Hensley.

In its memorandum opinion, the trial court focused on the parties' financial situations, examining Wife's need in relation to Husband's ability to pay alimony. As the owner of a beauty parlor, Wife's gross monthly income is approximately \$2,166. Husband's income is limited to social security benefits of \$918 per month; however, the trial court noted that the brown house, owned by Husband, has a demonstrated rental income potential of \$1,500 per month.

Based upon the record, we find that the evidence does not preponderate against the trial court's conclusion that Wife has shown a need for spousal support in order to adjust to the economic consequences of the divorce. Before they separated, Husband and Wife built a smaller "retirement" home. Wife was forced to leave this home after a domestic dispute. Wife currently resides in a home valued at \$48,000, property she owned before the marriage. She owns no other real property.

Wife's monthly expenses include health insurance payments of almost \$300, approximately \$100 in medicine, and the residence's utility and telephone bills. These monthly bills will make it difficult, if not impossible, for Wife, age 60 at the time of the trial, to retire in the near future. Wife must make significant adjustments to her future plans to adapt to the effects of this divorce.

The evidence does not preponderate against the trial court's determination that Husband is able to pay \$400 per month. Husband has been awarded separate property, valued at \$366,000, from which he may earn a substantial supplemental income. Husband is in a superior position to Wife regarding statutory factor (1), which directs a trial court to consider the parties' relative financial resources. Additionally, factor (7) requires consideration of the separate assets of the parties. Even with the debt incurred by construction of the new house, Husband is in a far more advantageous position than Wife regarding factor (7).

Husband notes that though his separate property is of greater value than Wife's separate property, his separate property is about \$200,000 less than when he married in 1987. This fact is irrelevant to the trial court's alimony determination. This court has held that a trial court dividing a marital estate properly considered only property that the parties owned at the time of the divorce. *Hulshof v. Hulshof*, No. 01A01-9806-CH-00339, 1999 WL 767807 (Tenn. Ct. App. M.S., Sept. 29, 1999). The court reasoned that it “cannot divide and/or distribute what is 'not there' - property no longer owned by the parties ... at the time of the divorce.” *Id.* (quoting *Brock v. Brock*, 941 S.W.2d 896, 900 (Tenn. Ct. App. 1996)). The same rationale applies when considering separate property for purposes of alimony awards. The trial court properly considered only the assets owned by the parties at the time of the divorce.

Both parties have stated concerns about their sources of income in the future. Neither Husband, age 64 at the time of the trial, nor Wife, age 60 at the time of the trial, will have many opportunities to receive additional education or work training. Husband, who was once a successful small business owner, has been totally disabled since 1994. Husband suffers from depression and allergies. Wife has serious back problems; despite her back pains, Wife continues to work as a beauty stylist, a job that keeps her on her feet for many hours at a time. Thus, applying the factors set forth above, Husband and Wife are relatively equal with respect to factors (2), (4), and (5). Regarding factor (3), the parties married each other in 1987 and separated in 2002.

Statutory factor (9) requires consideration of the standard of living established by the parties during the marriage. In divorce actions, parties may not be able to maintain the same standard of living enjoyed during marriage. *Robertson v. Robertson*, 76 S.W.3d 337, 340 (Tenn. 2002). Temporary alimony may be awarded as a means to support an economically disadvantaged spouse's adjustment to the divorce. *Id.* at 341. We believe that Wife demonstrated that her standard of living has decreased since separation and though rehabilitation is not necessary, she needs alimony to adjust to the economic consequences of the divorce. During their marriage, the parties lived a comfortable, though not extravagant, lifestyle. During their marriage, Husband and Wife lived on a farm that the trial court valued at \$366,000, enjoyed two steady sources of income, and could receive an additional \$1,500 per month from renting the brown house. Wife now lives in a \$48,000 home and her salary

is her only means for support. Husband argues that there is inadequate evidence of Wife's decreased standard of living. We disagree.

Statutory factors (8), regarding the division of marital property, and (10), regarding the tangible and intangible contributions of the parties, have been discussed in the previous section.

Trial courts are permitted to consider the relative fault of the parties, when appropriate, in determining alimony awards. The trial court held that “[t]he evidence in the instant action preponderates in favor of a finding that during the course of the marriage, Mr. Hensley engaged in a course of conduct which caused anxiety and distress to Ms. Hensley, rendering cohabitation unendurable and unacceptable.” After an examination of the record, we do not find that the evidence preponderates against this finding.

The record supports our conclusion that the trial court did not err in examining the statutory factors in the context of this case. The evidence presented does not preponderate against the trial court's alimony award. We hold that the trial court was within its wide discretion in awarding Wife \$400 per month for five years.

C. ATTORNEY'S FEES

The award of attorney's fees is within the discretion of the trial court, and the award will not be overturned absent an abuse of discretion. *Storey v. Storey*, 835 S.W.2d 593, 597 (Tenn. Ct. App. 1992). The Tennessee Supreme Court has directed trial courts determining whether to award attorney's fees in a divorce proceeding to apply the same factors that are relevant in alimony awards. *Langschmidt v. Langschmidt*, 81 S.W.3d 741, 750-51 (Tenn. 2002). Thus, the discussion and analysis of the statutory factors in section B above apply equally to the issue of Wife's award of attorney's fees. A trial court may award fees when a spouse lacks sufficient liquid funds to pay the legal fees. *Smith v. Smith*, 984 S.W.2d 606, 610 (Tenn. Ct. App. 1997). The trial court found that “under the circumstances of this case, Ms. Hensley will not be vested with adequate assets for her needs and payment of all of her attorney's fees.” We find that the trial court did not abuse its discretion in awarding Wife attorney's fees and affirm.

V. Conclusion

For the aforementioned reasons, we affirm the trial court's judgment in all respects. Costs on appeal are assessed to the Appellant, Johnny Cline Hensley.

SHARON G. LEE, JUDGE